

## 46 Am. Jur. 2d Judges § 82

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### Judges

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### IX. Disqualification to Act in Particular Case

#### A. Disqualification to Act in Particular Case, in General

## § 82. Statutes governing disqualification of judge—Validity of statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Judges](#)  39, 40

### A.L.R. Library

[Laws Governing Judicial Recusal or Disqualification in State Proceeding as Violating Federal or State Constitution](#), 91 A.L.R.5th 437

Recusal statutes must be considered in light of the constitutional authority of a state's highest court to administer the courts of the state.<sup>1</sup> Some courts have held that a statute authorizing a litigant or attorney to remove a judge from a case by filing an affidavit alleging the judge's prejudice does not violate the state's separation of powers doctrine,<sup>2</sup> while other courts have taken the contrary view.<sup>3</sup> Statutes providing for disqualification based solely on an application in writing have been found unconstitutional because they essentially permit a party to exercise a peremptory challenge of a judge. However, a disqualification statute that does not contain an outright hindrance of a court's ability to adjudicate a case or the substantial destruction of the exercise of a power essential to the judiciary does not violate a state constitution which provides for judicial power and the election of judges, because there is a rationality requirement in the statute.<sup>4</sup>

### Caution:

A stipulation or agreement to disqualify a judge has been found unconstitutional under the separation of powers doctrine.<sup>5</sup>

A statute which provides that a litigant in certain courts may, by filing a peremptory challenge of the judge assigned to try the cause, obtain the assignment of another judge but which makes no provision for a similar challenge by litigants in other courts exercising the same powers and jurisdiction violates a constitutional requirement that all laws of a general nature must have a uniform operation. However, a statute providing that any party, except the prosecution in a criminal case, may, by filing a peremptory challenge of the judge assigned to try the cause, obtain the assignment of another judge, does not, by reason of the exception therein made, violate a constitutional provision that no citizen or class of citizens will be granted privileges or immunities which upon the same terms will not be granted to all citizens.<sup>6</sup>

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#### Footnotes

- 1 [Ferren v. City of Sea Isle City](#), 243 N.J. Super. 522, 580 A.2d 737 (App. Div. 1990).
- 2 [In re Daniel R.](#), 291 Ill. App. 3d 1003, 225 Ill. Dec. 900, 684 N.E.2d 891 (1st Dist. 1997); [Traynor v. Leclerc](#), 1997 ND 47, 561 N.W.2d 644 (N.D. 1997); [State v. Holmes](#), 106 Wis. 2d 31, 315 N.W.2d 703 (1982).
- 3 [Johnson v. Goldman](#), 94 Nev. 6, 575 P.2d 929 (1978) (a peremptory challenge was permitted without the necessity of filing an affidavit of bias or prejudice).
- 4 [State ex rel. Kafoury v. Jones](#), 315 Or. 201, 843 P.2d 932 (1992).
- 5 [People v. Superior Court \(Mudge\)](#), 54 Cal. App. 4th 407, 62 Cal. Rptr. 2d 721 (2d Dist. 1997), as modified on other grounds, (May 9, 1997).
- 6 [Austin v. Lambert](#), 11 Cal. 2d 73, 77 P.2d 849, 115 A.L.R. 849 (1938).

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